

**COMMONWEALTH OF MASSACHUSETTS  
THE SUPREME JUDICIAL COURT**

In the Matter of

Request for Comment

On the Report of the Ad Hoc Advisory Committee

To Study Canon 3B(9) of the Code of Judicial Conduct

Provisions in S.J.C. Rule 3:09, Canon 3B(9)

**COMMENTS OF  
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## **Introduction**

As a media lawyer for over 30 years representing publishers, editors, reporters, and media associations, I bring a direct contact perspective to the Court's revision of Canon 3B(9). My comments do not reflect those of any client or association I represent, but are intended to be solely my personal commentary.

Among my public discussions with Chief Justice Marshall, my private conversations with sitting Judges, and requests from the media seeking comment from Judges, I have seen a general misunderstanding and apprehension of the intent Canon 3B(9) brings to all. Therefore, the proposed recommendations bring a breath of fresh air from the Advisory Committee.

However refreshing this truly is, the air is still not clear. The message ought to be that Judges can speak without fear of reprisal; rather than, speak at their own peril. In this context, I support the core purpose of the recommendations of the Advisory Committee to bring greater understanding and clarity to this Canon, and to this end I offer comments set forth below.

## **Comments:**

1. 3B(9)(a). This paragraph allows a judge to explain "general legal principles" which may not include specific laws or statutes supporting a legal principle, such as the complexities of the bail statute. Please consider adding after general legal principles: "or specific statutes and laws." Specifically relating a legal concept to the explanation of a specific statute would go a long way to clarifying a question from the public or press. This may seem mundane, but judges are reluctant to answer almost any question from a reporter or the general public after he or she leaves the courtroom. Clarifying this both here and in the Commentary would assist all.

2. 3B(9)(b). This new paragraph includes the word "conduct" with some explanation in the Commentary. The Commentary attempts to limit the definition of "conduct" to a judge's behavior. Conduct, by definition, includes not only behavior, but also, performance, demeanor, actions, activities, deeds, doings, exploits, etc. In the judicial setting the public is usually concerned with the actual decision, not how a judge "behaves." Please consider after "from making public comments concerning his or her behavior" the words "or his or her application of specific legal concepts." The caveat being the remainder of the sentence.

3. Commentary to Section 3B(9). In the fourth paragraph there is some impracticality in defining "In the course of his or her official duties" by limiting this to "administrative duties." In fact, after they leave the courtroom, a reporter or the general public may ask the judge a question on jury selection, bail, sentencing, or the definition of "actual malice." Instructively only, and not putting into question the impartiality of the judge nor the merits of the case, a judge should be allowed to answer. The judge should



not be subject to prior restraint. If the judge errs, then he or she will be so told. However, it has been my experience that judges are intelligent, thoughtful, and experienced legal practitioners. The request is generally from a citizen who genuinely does not understand what happened in the courtroom. If any other ulterior motive is perceived, the judge, like any person in America, does not have to speak. Both of these concepts should be made clear. As an example, the following might be helpful: "After a Court proceeding, in response to an inquiry from the public or press about a specific law or statute, the judge should interpret this Canon to permit such response, but not require it."

4. Commentary. As a general principle the Commentary should encourage judges to speak, if they want to. By its absence, the tone and intent of the recommendations, and circumstances that prompted the Advisory Committee to be created, are muted. The public cries for judicial accountability, when in fact all they really want is to understand the system. The system is complex; laws are intertwined; statutes are cumbersome; lawyers are just as uncertain at times. Now is the opportunity to state clearly to the public (and to our judges) that the SJC will not punish honest, intelligent, forthright explanations of the law – when asked outside the courtroom. The Canon is a guide. The Canon should never impose upon a judge an obligation to speak. It is the judge's right not to speak; as it is the judge's right to speak. Please consider supplementing the Commentary as a last sentence: "This Canon makes no provision abridging the freedom of a judge's speech."

5. Commentary. A new provision is to suggest to judges that statements concerning a judge's conduct be made by a third party. At the moment, judges have available (a) Joan Kenney as the SJC spokesperson; (b) the Media Judiciary Committee; and (c) the newly formed Media Relations and Outreach Group. With these avenues and the SJC itself, it is possible judges may never speak again. Either their proxies or a scripted response will comment. The citizenry really wants to hear from the judges themselves; but this is a beginning of the unbuckling of what has been publicly termed muzzling.

## **Conclusion**

Judges have told me they want to speak to the public and the press when asked questions. Judges have told me they will accept telephone calls from reporters to clarify conduct. These judges know the bounds of judicial conduct, but confide they are still anxious to speak. This is not right – not in America. Prior restraint is not tolerated by our courts upon the people; nor should judges feel, have the impression, or fear that a freedom is curtailed – even if it is not. The Ad Hoc Advisory Committee has the opportunity to proclaim this freedom, and I urge them to do so.

It is my sincere hope that you find these comments helpful. I thank you for your attention and I thank the Advisory Committee for its great work.

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